



6450-01-P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project – Post-2017 Resource Pool

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of final marketing criteria and call for applications.

SUMMARY: The Western Area Power Administration (Western), a Federal power marketing agency of the Department of Energy (DOE), announces the Boulder Canyon Project (BCP) post-2017 resource pool marketing criteria and is calling for applications from entities interested in an allocation of Federal power from the BCP. The Conformed Power Marketing Criteria or Regulations for the Boulder Canyon Project (2012 Conformed Criteria) published in the Federal Register on June 14, 2012, as required by the Hoover Power Allocation Act of 2011, established general eligibility criteria and a resource pool (Post-2017 Resource Pool) to be allocated to new allottees. Western has finalized marketing criteria, developed through a public process, to be used to allocate the Post-2017 Resource Pool, which will become available October 1, 2017. These marketing criteria, in conjunction with the 2012 Conformed Criteria, establish the framework for allocating power from the Post-2017 Resource Pool. Entities applying for an allocation of power from the Post-2017 Resource Pool must submit formal applications as described within this notice.

DATES: Entities applying for an allocation of Federal power from Western must submit an application (see Applicant Profile Data (APD) in Section II) through one of the methods described below. Western will accept applications received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Western reserves

the right to not consider any applications received after this date.

ADDRESSES: Applications must be submitted to Mr. Darrick Moe, Desert Southwest Regional Manager, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005-6457.

Applications may also be faxed to (602) 605-2490 or e-mailed to Post2017BCP@wapa.gov.

Application forms are available upon request or may be accessed and/or submitted online at http://www.wapa.gov/dsw/pwrmt/BCP_Remarketing/BCP_Remarketing.htm. Applicants are encouraged to use the application form provided at the above Web site.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Simonton, Public Utilities Specialist, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005-6457, telephone number (602) 605-2675, e-mail Post2017BCP@wapa.gov.

SUPPLEMENTARY INFORMATION:

The BCP was authorized by the Boulder Canyon Project Act of 1928 (43 U.S.C. § 617) (BCPA). Under Section 5 of the BCPA, the Secretary of the Interior marketed the capacity and energy from the BCP under electric service contracts effective through May 31, 1987. In 1977, the power marketing functions of the Secretary of Interior were transferred to Western by Section 302 of the Department of Energy Organization Act (42 U.S.C. § 7152) (DOE Act). On December 28, 1984, Western published the Conformed General Consolidated Criteria or Regulations for Boulder City Area Projects (1984 Conformed Criteria) (49 FR 50582) to implement applicable provisions of the Hoover Power Plant Act of 1984 (43 U.S.C. § 619) for the marketing of BCP power through September 30, 2017.

On December 20, 2011, Congress enacted the Hoover Power Allocation Act of 2011 (Public Law 112-72) (HPAA), which provides direction and guidance in marketing BCP power after the existing contracts expire on September 30, 2017. On June 14, 2012, Western published the 2012

Conformed Criteria (77 FR 35671) to implement applicable provisions of the HPAA for the marketing of BCP power from October 1, 2017, through September 30, 2067. The 2012 Conformed Criteria formally established a resource pool defined as “Schedule D” to be allocated to new allottees. In accordance with the HPAA, Western allocated portions of Schedule D to the Arizona Power Authority (APA) and the Colorado River Commission of Nevada (CRC), respectively, as described in the June 14, 2012 Federal Register notice. Of the remaining portions of Schedule D, Western is to allocate 11,510 kilowatts (kW) of contingent capacity and associated firm energy to new allottees within the State of California, and 69,170 kW of contingent capacity and associated firm energy to new allottees within the Boulder City Area (BCA) marketing area as defined in the 2012 Conformed Criteria.

On October 30, 2012, Western published proposed marketing criteria to be used in the allocation of the Post-2017 Resource Pool. Public information and comment forums were held in Las Vegas, Nevada; Tempe, Arizona; and Ontario, California. Western received comments from existing power contractors, Native American tribes, cooperatives, municipalities, and other potential contractors. Transcripts of the public comment forums, as well as comments received, may be viewed on Western’s Web site at <http://www.wapa.gov/dsw/pwrmkt>.

Response to Comments on the Post-2017 Resource Pool Marketing Criteria

Western received numerous comments on its proposed Post-2017 marketing criteria during the comment period. Western reviewed and considered all comments received. This section summarizes and responds to the comments received on the proposed Post-2017 Resource Pool marketing criteria.

Ready, Willing, and Able:

Comment: Western should provide time flexibility for those seeking transmission

arrangements to meet potential ready, willing, and able provisions.

Response: Western intends to work with potential allottees to the extent feasible to ensure sufficient transmission arrangements are in place by October 1, 2016. However, it is the allottees' ultimate responsibility to meet the ready, willing, and able provisions.

Comment: Western should accept a Memorandum of Agreement (MOA) or similar documentation between an applicant and a transmission distribution provider as evidence the applicant has met the ready, willing, and able requirements. Requiring applicants to develop and execute contractual agreements prior to notification of an allocation could create an unnecessary political and procedural hardship for some applicants.

Response: Applicants will need to demonstrate satisfactory arrangements to meet ready, willing, and able requirements by October 1, 2016. Final allocation determinations are anticipated to be established well in advance of this date. Therefore, applicants should have adequate time to develop and execute any necessary contractual arrangements. Western may accept an MOA or similar documentation between an applicant and a transmission and/or distribution provider if it establishes a legally-binding right of the applicant to receive the required services.

Comment: Request all applicants, including Native American tribes, be required to meet the same criteria such as the ready, willing, and able requirement.

Response: Western finds that certain exceptions for Native American tribes, such as the ready, willing, and able requirement, are consistent with DOE's American Indian and Alaska Native Tribal Government Policy (Tribal Policy), available at <http://energy.gov/em/downloads/doe-american-indian-and-alaska-natives-tribal-government-policy>, and recognizes the special and unique relationship between the United States and tribal

governments. Western will work cooperatively with all applicants, but has found that additional flexibility in interacting with tribal applicants is important to ensure the successful implementation of tribal allocations.

Priority Consideration:

Comment: The HPAA identifies certain classes of applicants that may ultimately qualify for allocations; it does not identify any mandatory criteria for Western to utilize in prioritizing those allocations. At some point, Western must make such decisions. Western's proposed prioritization is reasonable to determine fair and equitable allocations.

Response: Western agrees with this comment. Western has the need and the authority to prescribe marketing criteria consistent with historical BCP legislation in order to evaluate applications in the allocation of the Post-2017 Resource Pool.

Comment: Western proposes a prioritization of preference-eligible entities in making new allocations. What is Western's statutory authority for making this prioritization? How did Western determine the ranking among preference-eligible entities as proposed?

Response: Section 5 of the BCPA and Section 302 of the DOE Act as well as HPAA authorize Western to establish and apply regulations governing BCP allocations, including the formation of project-specific marketing criteria as proposed. Western's proposed marketing criteria were established to promote widespread use, be consistent with DOE's Tribal Policy, and respond to the public interest in a finite resource. Western concludes that providing an initial consideration for Native American tribes is appropriate based on comments received, and because tribes are specifically identified by the HPAA as eligible allottees and have not previously received allocations of Hoover power. The remaining eligible entities were prioritized to promote widespread use principles in a manner that supports the public interest.

However, after considering comments received, Western has decided not to differentiate among the non-tribal, non-profit eligible entities in the final marketing criteria.

Comment: Reclamation Law and its particular priorities do not apply to the Hoover power allocation process. The BCPA establishes specific power allocation and customer priorities, and these statutory requirements govern the Hoover allocation process.

Response: Neither the HPAA nor the BCPA provide for a specific method for determining allocations of BCP power to new entities described in Section 5. Section 5 of the BCPA specifically authorizes the Secretary “under such general regulations as he may prescribe” to contract for the sale of Hoover power and to resolve conflicting applications for the power “with due regard to the public interest.” Western’s public process provides a transparent means of exercising this authority in making final allocations when potential demand is very likely to exceed the available resource to be marketed.

Comment: Section 5 of the BCPA governs the allocation of power from Hoover Dam. Section 5(c) of the BCPA gave the three States of Arizona, California, and Nevada the first right, or a super-preference over all other Section 5 applicants, to apply for, obtain and share among themselves in the power generated at the dam. The states’ application takes precedence over any other applicant.

Response: Section 5 of the BCPA cannot be applied in isolation in allocating Schedule D power. Under the HPAA substantial portions of BCP power, including portions of Schedule D, have been allocated to entities in Arizona, California, and Nevada, including the Arizona Power Authority and the Colorado River Commission of Nevada as the agencies specified by State law as the agents for their respective states to purchase power from the Boulder Canyon Project. Section 2(d) of the HPAA provides that the remaining Schedule D power must be allocated by

Western to entities not receiving Hoover power under Schedules A and B (“new allottees”).

Western concludes that allocating additional Schedule D power to the states would not be consistent with this provision of the HPAA. Furthermore, HPAA’s direction to Western to allocate 33 percent of Schedule D equally to the States of Arizona, California, and Nevada with the remainder to be allocated within the marketing area to new allottees indicates a congressional intent for Western to adhere to its historical practice of allocating the remaining portions of Schedule D based on the load or need of the applicants. The House Report for the HPAA (H.R. Rep. No. 112-159) also states that Western is expected to determine allocations by an assessment of the applicants power needs and act in objective manner consistent with Federal preference standards.

Comment: Absent direction from Congress, Western may not selectively implement elements of the BCPA Section 5 to the disadvantage of the “States,” i.e., Arizona, California, and Nevada.

Response: Western is not selectively implementing Section 5 of the BCPA to the disadvantage of the states. Section 5 grants the Secretary broad discretion to allocate power in accordance with the public interest and does not require that all BCP power be allocated to the states.

Comment: The HPAA did not authorize Western to take actions that would result in the State of Nevada receiving less resource from the pool than it contributed to the pool. Western’s allocation of the 69,170 kW of Schedule D to be marketed within the prescribed marketing area should be made in the same proportion as the states’ respective contributions to the resource pool.

Response: The HPAA does not require Western to allocate the remaining portions of Schedule D on a state-by-state basis, and instead requires Western to allocate Schedule D to new allottees

within the entire marketing area. Section 5 of the BCPA specifically grants the Secretary broad discretion to allocate power in accordance with the public interest. Western concludes that allocating Schedule D among eligible applicants based on their proportionate peak load serves the public interest while allocating based on the states' proportionate contributions to the resource pool does not.

Comment: Western's allocations of Hoover resources are governed by the HPAA and the BCPA and are not subject to the Preference Law concept in the 1939 Reclamation Act, so Western may not lawfully designate Rural Electric Cooperatives (Cooperatives) as potential new allottees in its allocation process; particularly when Congress was asked to include Cooperatives in Western's 69,170 kW allocation process under the HPAA, and declined to do so.

Response: Western's inclusion of Cooperatives among eligible entities is not based on the Reclamation Project Act of 1939, but rather on the language of the BCPA and the HPAA. In Section 5 of the BCPA, Congress identified "private corporations" as eligible entities, together with states, municipal corporations, and political subdivisions (43 U.S.C. § 617d). Further, Section 2(d)(2)(C)(i)(I) of the HPAA expressly provides (in relevant part) that Schedule D may be allocated to entities "eligible to enter into contracts under Section 5 of the Boulder Canyon Project Act...." Therefore, under both statutes, Cooperatives as private corporations are eligible to receive allocations under Schedule D.

Beyond the language of the statutes, Western finds additional support for its interpretation in House Report 112-159, which specifically lists Cooperatives among entities eligible to receive allocations from the new proposed Schedule D.

Comment: The legislative history supporting the HPAA reflects the intent of Congress to ensure that Cooperatives are provided access to the power made available under Schedule D.

However, that intent is not brought forth in the proposed marketing criteria, which state that Western will consider an allocation for a Cooperative after considering an allocation for federally recognized Native American tribes, municipal corporations, political subdivisions, irrigation or other districts, and other governmental organizations that have electric utility status. Western should ensure fair and equitable access to Cooperatives of Schedule D power.

Response: After considering comments and analyzing various options, Western has established marketing criteria that provide a first consideration to tribes and then treats all Section 5 non-profit entities equally. This results in an aggregation of all Section 5 eligible entities that are non-profit in nature, including Cooperatives. The first consideration to tribes is not intended to establish a tribal-only pool or to meet all tribal needs prior to other eligible applicants. Therefore, Western anticipates the criteria will provide opportunities to Cooperatives seeking Schedule D power.

Comment: Providing priority to Native American tribes, municipal corporations, and political subdivisions ahead of Cooperatives is an unprecedented departure in the treatment of traditional preference entities and is not consistent with the Congressional intent of HPAA. Western should consider applications of tribes on par with the applications of traditional preference entities such as Cooperatives and municipally-owned utilities.

Response: Western's marketing criteria are intended to promote widespread use, be consistent with DOE Tribal Policy, and respond to the public interest in a finite resource. Western has determined that providing an initial priority consideration for Native American tribes is appropriate based on comments received, and because tribes are specifically identified by the HPAA as eligible allottees and have not previously received an allocation of Hoover power. This first consideration for tribes is not intended to establish a tribal-only pool or to meet all

tribal needs prior to other eligible applicants. Western anticipates the criteria will provide opportunity to Cooperatives, municipally-owned utilities, and political subdivisions seeking Schedule D power.

Comment: Clarity should be made in priority number 2 such that a municipal corporation or political subdivision that receives power and/or support from a Cooperative should retain a second priority and not be demoted to a third priority.

Response: Based upon comments received, the proposed priority criteria were modified to consider Cooperatives equally with other non-profit Section 5 entities. The final criteria do not distinguish between a municipal corporation or political subdivision that receives services from a Cooperative and the Cooperative itself.

Comment: The 2011 amendments to Section 5 of the BCPA gave federally recognized Indian tribes a preference on an equal basis with other Section 5 applicants.

Response: The HPAA establishes Native American tribes as eligible entities to receive power from the BCP. The HPAA does not prescribe a priority, preference, or direction related to Western's consideration of eligible applicants.

Comment: Comments were received that support a first priority to tribes. Priority to tribes will help redress the historic lack of tribal access to project benefits and is consistent with the HPAA, Western's trust responsibility to tribes, Western's precedent in other marketing efforts, Western's administrative discretion as provided in Reclamation Law, underlying Congressional intent, and HPAA's directive that Western fairly and equitably determines allocations from the new power pool.

Response: Western finds merit in the retention of a tribal priority. Western has consistently provided increased opportunities for Native American tribes. Such consideration has been

extended to tribes as Western seeks to promote Federal tribal initiatives as described in Title 5 of the Energy Policy Act of 2005 and DOE's Tribal Policy. The first consideration for tribes does not constitute a tribal-only pool or mean that all tribal needs will be met prior to other eligible applicants.

Comment: Allocations should meet the peak tribal demand requirement before allocations are made to the next priority.

Response: Western finds merit in the retention of a first consideration for tribes. However, it is anticipated that the demand for Schedule D power will far exceed what is available, and Western is not prescribing a tribal-only pool. Allocating the Post-2017 Resource Pool to fully meet peak tribal demands prior to making allocations to Section 5 entities would likely hinder Western's ability to allocate Schedule D power to non-tribal entities and would restrict the promotion of widespread use to a diverse base of customers.

Comment: Priority for Native American tribes should be capped at a maximum of 50 percent of new power allocations available to all states combined to all or any Native American tribes.

Response: After considering comments and analyzing various options, Western has established marketing criteria providing tribes first consideration for an allocation of up to 25 percent of their peak load, considering all Federal power allocations and a 3,000 kW maximum allocation for any applicant. These criteria seek to establish meaningful tribal allocations while also preserving a reasonable portion of Schedule D for new entities eligible under Section 5 to promote widespread use to a diverse base of customers.

Comment: Congress did not intend for the federally recognized tribes to have exclusive rights to the Schedule D power, and the priority criteria will operate as such if there are sufficient applications for allocations.

Response: Western's marketing criteria does not establish a tribal-only pool; the first consideration given to tribes will extend up to 25 percent of their peak loads, considering all Federal power allocations and the 3,000 kW maximum allocation for any applicant. These criteria seek to establish meaningful tribal allocations while also preserving a reasonable portion of Schedule D power for new entities eligible under Section 5 to promote widespread use to a diverse base of customers.

Comment: There should be no priority among all BCPA Section 5 entities and federally recognized Native American tribes. Allocations should be based on other marketing criteria elements, such as the actual load or energy demand of each applicant, whether the applicant already receives the benefits of a Federal power resource, and the applicant's ability to take delivery of the energy to meet their load.

Response: After considering comments and analyzing various options, Western has retained a first consideration for tribes, but modified the marketing criteria to aggregate all Section 5 eligible entities that are non-profit in nature for allocations after meeting up to 25 percent of tribal peak load when considering all Federal allocations.

Comment: Public water agencies should have an equal opportunity to obtain Federal energy resources that are reserved for the public benefit. The provision of public utility service is of equal benefit to the public, whether the utility is water or electric service.

Response: After considering comments and analyzing various options, Western has established marketing criteria that aggregates all Section 5 eligible entities that are non-profit in nature. Therefore, water and electric utilities will be treated equally.

Comment: Absent direction from Congress, Western may not impose an "electric utility status" priority or requirement on potential allottees, particularly when Congress declined to

adopt a proposed amendment to the HPAA seeking preference for full-service public power providers. Giving priority to entities having electric utility status would eliminate or at least prejudice the status of all otherwise eligible applicants who are customers of electric utilities. The marketing criteria should include municipal corporations and political subdivisions including irrigation or other districts, municipalities and other governmental organization without electric utility status. Western should eliminate the priority for having electric utility status.

Response: After considering comments and analyzing various options, Western has determined there is no need to retain the provisions regarding electrical utility status for establishing allocations.

Comment: Comments were received that support Western's continued adherence to its historic policy of allocating Hoover power to new tribal customers without regard to their "electric utility status." This supports broad inclusion of new tribal customers, and nothing in the legislation or legislative record contradicts Western's adherence to this practice with respect to the Hoover allocation.

Response: After considering comments and analyzing various priority options, Western has not retained an electrical utility status priority or requirement for applicants.

Comment: There is no statutory requirement linking eligibility to an entity having electric utility responsibility, nor ownership of electric distribution facilities. Support the inclusion of public utilities other than electric utilities as it is essential to meet the "widest use" statutory requirements and public policy objectives.

Response: After considering comments and analyzing various priority options, Western has not retained an electrical utility status priority or requirement for applicants.

Comment: The proposed criteria properly give priority to municipal utilities and irrigation districts. Such entities should receive priority in the Post-2017 remarketing.

Response: After considering comments and analyzing various options, Western has established marketing criteria that aggregates all Section 5 eligible entities that are non-profit in nature for allocations after meeting 25 percent of tribal peak load when considering all Federal allocations.

Comment: The HPAA provides for Schedule D for “entities not receiving contingent capacity and firm energy under subparagraphs (A) and (B). . . .” Western’s proposed marketing criteria do not include that criterion. The marketing criteria must adhere to statutory directives in the allocation of the Post 2017 Resource Pool.

Response: Part VI Section D of the 2012 Conformed Criteria states in part that “Western shall offer Schedule D contingent capacity and firm energy to entities not receiving contingent capacity and firm energy under Section A (Schedule A) or Section B (Section B) (referred to herein as “New Allottees”) for delivery commencing October 1, 2017.” Therefore Western’s marketing criteria does adhere to applicable statutory directives. Based on comments received, Western has further clarified in the final marketing criteria that entities receiving Schedule A or Schedule B contingent capacity and firm energy from APA or CRC will not be eligible for an allocation as a new allottee.

Comment: If there is insufficient power available for interested and eligible entities within a subgroup, Western should give priority to applicants within each tier that would use the resource to advance environmental objectives.

Response: After considering this comment, Western has determined not to adopt the suggested priority for applicants that would advance environmental objectives. Such a priority

is not addressed in either the BCPA or HPAA, and Western is not aware of applicable criteria to determine which uses would advance environmental objectives.

Comment: Western should avoid allocation to only the first priority tier in order to promote widespread use to a diverse base of customers. Western should reserve portions of power for subsequent tiers to meet demands of more than just the first priority tier.

Response: Western agrees with this comment. Although final allocations are dependent upon the applications received, Western does not anticipate allocating the entire Schedule D resource pool to a single category. In response to comments of this nature, Western has established a 3,000 kW maximum allocation. The 3,000 kW maximum allocation will be applied to all entities receiving an allocation of Schedule D. The final marketing criteria seek to establish meaningful tribal allocations and preserve a reasonable portion of Schedule D power for new entities eligible under Section 5 to promote widespread use to a diverse base of customers.

Comment: Would there be any power reserved for each priority group?

Response: Final allocations are dependent upon the applications received. However, Western anticipates allocating power to both tribal entities and entities eligible under Section 5 of the BCPA. In response to comments of this nature, Western has established a 3,000 kW maximum allocation. The maximum allocation criterion will help promote widespread use to a diverse base of customers.

Comment: With regard to municipal water utilities, what is meant by the independently governed standard?

Response: After considering comments, Western has eliminated this requirement.

Comment: If allocating to an aggregated entity, is its priority established by the nature of its members, or its own nature?

Response: Eligibility and priority will be determined based upon the nature of the applying entity. All members of an aggregated entity must be themselves defined as an eligible entity.

Consideration of Existing Federal Power Resource Allocations:

Comment: In this Hoover allocation effort, Western should impose a maximum of five percent reduction on new tribal customers receiving the benefit of other Federal hydropower resources.

Response: Under Western's marketing criteria, first consideration will be given to tribes for up to 25 percent of their peak loads considering all Federal power allocations. Western finds merit in considering the direct or indirect benefits of all Federal power allocations of all applicants, without limitation, to ensure Federal power is spread widely and equitably among eligible entities.

Comment: In order to advance the "widest use" public policy objective, Western should deem entities currently receiving any Western allocation, not just BCP resources, to be ineligible for Schedule D resources.

Response: Western will not deem entities to be ineligible based solely upon existing Western allocations from other projects; however, all existing Western allocations will be considered in the allocation process to advance widespread use principles.

Comment: While it is understood that Western has not proposed to exclude or reprioritize tribes that currently have an allocation of Federal power, tribes should not be blocked from receiving an allocation, by disqualification or reprioritization, on the basis of a prior Federal resource allocation.

Response: Western will not prevent a tribe from receiving an allocation solely because it currently receives an allocation from another Western project. First consideration will be given

to tribes to receive up to 25 percent of their peak loads considering all Federal power allocations.

Comment: Preference should be given first to tribes, regardless of receiving any other Federal hydropower allocation, and then to non-tribal entities, if there is any Hoover power left.

Response: Western's marketing criteria does provide first consideration to tribes for up to 25 percent of their peak loads considering all Federal power allocations. Western finds merit in providing opportunity for non-tribal applicants and that it is consistent with the intent of the HPAA. Western anticipates the marketing criteria will promote Federal tribal initiatives and provide opportunity for non-tribal applicants.

Comment: Western should consider other Federal power allocations as well as the availability of other lower cost power to the applicants. Greater consideration should be given in instances where Hoover power is the only lower cost power available to the applicant. First priority should be provided to eligible entities that currently do not have a contract with Western for Federal power resources or are not a member of a parent entity that has a contract with Western for Federal power.

Response: Western will consider any other Federal power allocations the applicants receive, either directly from Western or indirectly through a parent or host entity, when making allocation determinations, but will not consider the price of power as prices change over time and there are a number of variables that may be influencing such prices.

Load Data and Application Assistance:

Comment: Technical assistance provided by Western in the preparation of an application for Hoover power should be made available equally to any eligible applicant.

Response: Western agrees with this comment and will endeavor to assist all those in need of technical assistance.

Comment: Western should seek representative load data from applicants when available and allow applicants to supplement such load data with other information, including aggregated load data, to support any request for an allocation as well as estimating loads where historical information is not available. Recommend Western consider new or future loads in establishing allocations.

Response: Western will base allocations to eligible applicants on actual loads experienced in one of the last three calendar years, i.e., calendar years 2011, 2012, or 2013, as designated by the applicant. For Native American tribes, Western may use estimated load values if actual load data is not available. An applicant will be able to submit other information it deems pertinent to receiving an allocation. Such information will be considered at Western's discretion. Consideration of future loads would introduce speculation and unquantifiable collective risk across all applicants and will not be the foundation of establishing allocations.

Comment: Suggest Western consider allowing applicants to provide a broader range of load history than just one year at their election. Western should allow consideration of the historical load experienced by an eligible applicant over the previous three year period if an applicant can demonstrate significant load/demand variance and can explain the basis for the variance.

Response: Western will base allocations to eligible applicants on actual loads experienced in one of the last three calendar years, i.e., calendar years 2011, 2012, or 2013, as designated by the applicant. For Native American tribes, Western may use estimated load values if actual load data is not available. Western anticipates that this will provide additional flexibility than the proposed most recent calendar year and will maintain a comparable and manageable basis for allocations.

Minimum Allocation and Aggregation:

Comment: Western should not allocate Hoover power that has access to the dynamic signal in such small increments as to be non-cost-effective.

Response: Under the HPAA and the 2012 Conformed Criteria, all BCP Contractors are entitled access to the dynamic signal regardless of the size of their allocation. While allocations may be made as small as 100 kW, Western's anticipates the establishment of operational protocols to enable Western and the contractors to meet industry scheduling parameters such as scheduling in whole megawatt (MW) values. These operational protocols may assist in the cost effectiveness of managing small allocations.

Comment: Western has stated that the administrative costs associated with dealing with small allocations will be subsumed into general administrative costs and spread over the entire allocation base. Why would other allottees be required to subsidize a cost that can be allocated directly to a particular allottee? Is this subsidy going to reach across all Hoover contractors?

Response: Western's costs for the administration of power allocations are tracked and accounted for each Federal project at the functional activity level (scheduling, dispatching, marketing, etc.) rather than for each contractor. This is true of all Federal projects administered by Western, including the BCP. These costs are aggregated and included in the Federal project's revenue requirement. Each contractor pays its proportionate share of the revenue requirement on a per unit cost basis. This accounting treatment conforms to generally accepted accounting principles and is consistent with Federal Energy Regulatory Commission (FERC) regulations, FERC's prescribed uniform system of accounts for electric utilities, and DOE's accounting practices. Western concludes this is an acceptable means of cost recovery across customers of variable allocations sizes.

Comment: Western can appropriately address its allocation rounding concerns solely through

operational protocols.

Response: Western agrees with this comment and, therefore, has lowered the minimum allocation threshold for the BCP from 1,000 kW to 100 kW. Western anticipates establishing operational protocols in the contracting process to minimize rounding and other issues associated with the delivery of small allocations.

Comment: The commenter supported the ability of applicants to aggregate loads to meet minimum allocation requirements.

Response: Western's proposed marketing criteria included minimum allocations of 1,000 kW; Western also proposed allowing applicants to aggregate their loads to meet this requirement. After considering comments, Western is adopting a minimum allocation of 100 kW for each applicant, which may include an aggregated entity. However, note that scheduling protocols require a 1 megawatt (MW) minimum; therefore, smaller entities will likely need to formulate aggregation arrangements to facilitate deliveries. The adoption of a much lower minimum allocation is anticipated to eliminate the need for aggregation for allocation purposes.

Comment: Support for the establishment of allocation criteria that provides tribes with maximum flexibility to access Schedule D power. Western should ensure that the implementation of an aggregation mechanism does not result in a loss of Schedule D power to new entities due to a given allottee's inability to meet Western's aggregation standards. Western must implement the tribal priority to ensure that allocations to willing and eligible Schedule D allottees are satisfied to the maximum extent feasible prior to the returning any Schedule D power to Schedule A and B contractors.

Response: After considering comments, Western is adopting a minimum allocation of 100 kW for each applicant, which may include an aggregated entity. Therefore, perceived risk

associated with aggregation to receive an allocation has been minimized. Western agrees that efforts should be made to distribute Schedule D power to new allottees. Therefore, Western has established marketing criteria element “M”, which results in allocated Schedule D resource that is not put under contract by October 1, 2016, to be redistributed to other new allottees that have been allocated and contracted for Schedule D with Western. This criterion is anticipated to ensure all of the Schedule D resource that Western allocates will be retained by new allottees.

Comment: Comments were received that oppose any minimum allocation. Western has not demonstrated sufficient justification to require the proposed minimum 1,000 kW allocation criteria or to require new customers to enter into an “aggregation arrangement” in order to satisfy the requirement. Western has offered no justification for the minimum allocation criteria other than for its own convenience, which, by itself, is not a justification. This requirement penalizes the smallest scale new customers, a group consisting overwhelmingly of small tribes in the service area. Western should proceed without of a minimum allocation requirement.

Response: After considering comments, Western is adopting a minimum allocation of 100 kW for each applicant, which may include an aggregated entity. The 100 kW minimum has been established to assist Western in adhering to sound business principles when establishing allocations. An allocation of less than 100 kW is of such a small magnitude it has historically not yielded meaningful value to the allottee. In times in which a benefit or bill crediting arrangement has been sought, allocations of less than 100 kW have experienced significant difficulty in acquiring a benefit or bill crediting partner willing to engage in transactions for this quantity of power. This 100 kW minimum allocation threshold has been successfully applied in other Western marketing efforts and Western finds merit in establishing it for this allocation process.

Comment: Linking individual allocations with some type of allocation share penalty due to scale is unprecedented and without justification. Western regularly manages the Hoover and other hydropower resources in less than full megawatt quantities. Therefore, given the total number of potential new tribal Hoover customers, Western's approach of only whole megawatt allocations would be prejudicial and would only penalize tribes.

Response: Western has historically established minimum allocation and/or load thresholds to maintain sound business principles. After considering comments, Western has eliminated a 1,000 kW minimum allocation and is instead adopting a minimum allocation of 100 kW. This significant reduction in the minimum allocation provides opportunity for small applicants while also establishing a practical threshold to ensure the allocation has sufficient value to warrant its implementation. However, note that scheduling protocols require a 1 MW minimum; therefore, smaller entities will likely need to formulate aggregation arrangements to facilitate deliveries.

Comment: Further clarification is needed for an applicant seeking an allocation of less than 1,000 kW. When would communication of how scheduling arrangements will work be expected? Since all non-tribal Arizona allocations will be going through the APA, would those arrangements be sufficient to meet any load aggregation requirements?

Response: After considering comments, Western has eliminated a 1,000 kW minimum allocation and is instead adopting a minimum allocation of 100 kW for each applicant, which may include an aggregated entity. Communications concerning scheduling arrangements and other operational related issues will occur during the contracting process. Allocations to non-tribal Arizona applicants offered through the APA will not be considered an aggregation arrangement. Applicants seeking less than 100 kW must meet the load aggregation requirements in some other manner.

Comment: The aggregation concept is vague as defined. Western should utilize the aggregation concept consistent with its historic allowance for aggregation on a voluntary basis in arranging for allocation scheduling and/or delivery. Allocating less than whole megawatts to tribes will not end up creating scheduling and operational problems for Western. Due to the limited number of tribal utilities, the vast majority of tribes would need to enter into some type of benefit crediting arrangement. This would achieve Western's expressed goal of aggregating the less than whole megawatt allocations.

Response: Western's proposed marketing criteria included minimum allocations of 1,000 kW and allowed applicants to aggregate their loads to meet this requirement. After considering comments, Western is instead adopting a minimum allocation of 100 kW for each applicant, which may include an aggregated entity. Western anticipates establishing operational protocols in the contracting process to minimize issues associated with the delivery of small allocations.

Comment: Western should accept a MOA or similar document between members of an aggregated group as demonstration of the group's intention and ability to apply for an aggregate load.

Response: To be considered for an allocation, the aggregated group, as the applicant, must be an eligible entity as defined by the HPAA and the 2012 Conformed Criteria, and must provide sufficient documentation demonstrating this eligibility. All members of an aggregated entity must be themselves defined as an eligible entity. Western may accept the use of a MOA or similar documentation between members of an aggregated group as demonstration of the group's intention and ability to apply for an aggregate load if it establishes a legitimate, legally-binding aggregation of the members as determined by Western.

Comment: Western should address the authority for allottees to join together and the nature of

their ability to do so in terms of the type of entity that would have to be utilized. Where do these envisioned entities classify under Section 5 of the BCPA eligibility definition?

Response: In order to be eligible for an allocation, the entity submitting the application must either be a Native American tribe or a Section 5 entity. The determination of whether the applicant meets these requirements will be made on a case-by-case basis.

Economic Benefit to Tribes:

Comment: The HPAA makes specific reference to the Secretary of Energy obligation to offer capacity and energy under Schedule D. While Western may desire flexibility to provide an equivalent benefit as set forth in subsection L, the statutory language of the HPAA limits the Secretary to providing contingent capacity and firm energy.

Response: The HPAA requires that Western allocate the contingent capacity and firm energy to eligible entities by December 2014, and place it under contract by October 1, 2017. It does not prohibit Western from including provisions in the contracts to provide the economic benefits to allottees should issues with the delivery of the service occur. It is anticipated that economic benefits would be achieved through arrangements with third-party benefit-crediting or bill-crediting partners.

Comment: Western should clarify what is meant by “unanticipated obstacles” and “economic benefit” as these terms are used in these proposed criterion. This criterion should either be eliminated or applied to all eligible applicants equally.

Response: The phrase “unanticipated obstacles” refers to unexpected barriers to delivery of the electric service. In such instance, Western will follow its historic practice of allowing tribes to contract with a third-party for benefit or bill-crediting arrangements yielding the economic value (economic benefit) of the delivered power directly to the tribe. This will only be available

to tribes.

Additional Marketing Criteria Comments:

Comment: Requirements to execute a contract within six months of receiving a contract offer from Western and requirements related to transmission or distribution service in place by October 1, 2016 are acceptable.

Response: Western agrees with these comments and has retained this requirement.

Comment: Western's marketing effort schedule should be compressed to establish final allocations sooner than the summer of 2014 in order to provide tribes more time to reach contractual arrangement for the beneficial delivery of Hoover power to their communities.

Response: Western intends to complete the marketing effort through a public process as soon as possible, but anticipates that this will occur in the summer of 2014.

Comment: Western should adopt the plain language of the HPAA defining "new allottees" as "entities not receiving contingent capacity and firm energy" under Schedules A and B, and the clear intent of Congress to "further allocate and expand the availability of hydroelectric power generated at Hoover Dam." Existing customers of APA and CRC who have a sub-allocation for Schedules A and B through APA or CRC should not be eligible applicants for Schedule D from Western. All applicants should only be eligible to receive only one allocation of power among all the available Schedule D established via the HPAA.

Response: The HPAA defines "new allottees" as entities not receiving contingent capacity and firm energy under Schedule A and Schedule B. This definition excludes not only the contractors named in those schedules, but also entities receiving sub-allocations of the capacity and energy. Therefore, neither the listed contractors nor their sub-allottees will be eligible for an allocation from the Post-2017 Resource Pool. Post-2017 sub-allocations of BCP power made by

APA or CRC subsequent to Western's allocation process are to be established through the respective APA or CRC allocation process.

Comment: The HPAA indicates that Schedule D is intended to go to new allottees, which are entities that are not named in the legislation. APA customers are not named in the legislation. APA customers have no assurances that anything allocated to APA will come their way. APA customers should be treated as potential new allottees to avoid potential exclusion. Request further explanation on how Western intends to proceed.

Response: The HPAA defines "new allottees" as entities not receiving contingent capacity and firm energy under Schedule A and Schedule B, and not as entities that are not named in the legislation. Therefore, Western will not provide an allocation to any entity currently receiving Schedule A or Schedule B power.

Comment: Western should consider allocation to existing APA customers with withdrawal provisions in the event that allottee was to be allocated further BCP resource from APA.

Response: Western has not adopted this proposal. The HPAA requires Western to allocate Schedule D power by December 2014 for delivery commencing on October 1, 2017. It is currently unclear when APA allocations will be made. Western cannot ensure there would be sufficient time to make subsequent allocations and contracts for any Schedule D power made available after conclusion of the APA process. Western concludes that implementation of its allocation process contingent upon such external factors is not practical.

Comment: Western may not, through its administrative processes, impose standards, requirements or limitations on potential new allottees, that are inconsistent with or not authorized by Federal law specific to the BCP.

Response: Western's marketing criteria are in compliance with Federal law specific to the

BCP.

Comment: Western must contract directly with each tribe receiving Hoover power. Western has identified no precedent for deviation from such a practice and, in fact, Western has never contracted in any manner other than directly with its allocation recipients.

Response: Western intends to contract directly with each tribe receiving an allocation.

Comment: Western should clarify how it will treat customers eligible for/receiving Hoover allocations through the States of Nevada or Arizona.

Response: The HPAA states that the Western Schedule D allocations in Arizona and Nevada to other than Native American tribes are to be offered through APA and CRC, respectively. Therefore, after making any allocations to non-tribal entities in those states, Western will contractually provide the capacity and energy to APA and/or CRC, which will contract directly with the allottee. The contracts between APA and/or CRC and the allottee must contain all contract terms required by the HPAA, the 2012 Conformed Criteria, and any necessary provisions prescribed in Western's contracts with APA and/or CRC.

Comment: Western should publish in a single document all of its criteria and regulations regarding or impacting BCP, including the relevant portions of the 1984 marketing criteria as well as the material resulting from its actions on the June 14, 2012, and October 30, 2012 Federal Register notices.

Response: Although Western will not combine all that information into one hard copy document, those materials are all available for review at Western's BCP Web site located at http://www.wapa.gov/dsw/pwrmkt/BCP_Remarketing/BCP_Remarketing.htm.

Comment: Western's identified procedure to address the allocation of Schedule D is vague. Matters not clarified by Western's proposed criteria may constitute a new agency action.

Western must provide a supplemental opportunity to address any new criteria created as part of this public comment process prior to making any allocations.

Response: There are no new criteria contained in this notice. The final criteria are all refinements of the proposed criteria developed in consideration of the comments Western has received. Therefore, Western concludes that it is not necessary to conduct further public processes to establish these marketing criteria.

Comment: Western should explain the formula for determining and allocating excess energy in written procedures during the allocation process.

Response: This process concerns only the allocation of Schedule D power and not the allocation of Schedule C excess energy under the HPAA. Therefore, no explanation or procedures concerning excess energy are being provided in this notice.

Comment: All applicants should only be eligible to receive one allocation of BCP power from Western or APA and/or CRC.

Response: After considering this comment, Western is not promulgating additional requirements or regulations to be imposed within the APA and/or CRC BCP allocation efforts. Western does not have the authority to prescribe requirements upon APA and CRC in their processes for marketing BCP power within their respective states. These provisions are also not provided for in either the BCPA or the HPAA.

Comment: Western should clarify in the final marketing criteria that the revised marketing criteria for Post-2017 apply solely to the allocation of Schedule D resources made available by the HPAA. Support a fair, transparent, detailed, and documented written process via the public record for the allocation of BCP resources.

Response: Western agrees with this comment and believes that it has appropriately done so.

Western is adopting the final marketing criteria after considering comments received through its public process.

Comment: Questions were submitted concerning a potential applicant's load location relative to the BCA marketing area and the contract terms that will be applicable to the sale of BCP power, such as if Hoover power is considered green/renewable, if any purchased firming power would be green/renewable, treatment of transactions with an Independent System Operator (ISO), ISO scheduling points, and provision of referenced documents and related contracts.

Response: Questions of this nature are outside the scope of the marketing criteria proposals. Questions concerning contract terms and individual applicants will be addressed later in the marketing process, as appropriate.

I. Final Post-2017 Resource Pool Marketing Criteria

The following general marketing criteria shall be applied to applicants seeking an allocation of power from the Post-2017 Resource Pool. This includes the 69.17 MW of Schedule D to be allocated within the entire marketing area and the additional 11.51 MW of Schedule D to be allocated within the State of California.

- A. Allocations of power will be made in amounts determined solely by Western in the exercise of its discretion under Reclamation Law, including the HPAA.
- B. Allocations will be made only to new allottees, defined in the HPAA as entities not receiving Schedule A and Schedule B contingent capacity and firm energy. An entity receiving Schedule A or Schedule B contingent capacity and firm energy from APA or CRC will not be eligible for an allocation as a new allottee.
- C. An allottee may purchase power only upon the execution of an electric service contract and satisfaction of all conditions stated within that contract.

- D. Eligible applicants, except Native American tribes, must be ready, willing, and able to receive and distribute or use power from Western. Ready, willing, and able means the eligible applicant has the facilities needed for the receipt of power or has made the necessary arrangements for transmission and/or distribution service, and its power supply contracts with third parties permit the delivery of Western's power. Eligible applicants must have the necessary arrangements for transmission and/or distribution service in place by October 1, 2016.
- E. An eligible Native American applicant must be an Indian tribe as defined in the Indian Self Determination Act of 1975, 25 U.S.C. § 450b, as amended.
- F. Eligible Native American tribes will receive first consideration for an allocation of BCP sufficient to provide Federal hydropower up to 25 percent of their peak load in consideration of criterion element G.
- G. In making allocations, Western will consider the amount of the applicant's load already served by existing Federal power resource allocations.
- H. Remaining Schedule D shall be allocated to non-profit applicants eligible under Section 5 of the BCPA in proportion to their peak loads.
- I. Western will base allocations to all eligible applicants on actual loads experienced in one of the last three calendar years including calendar years 2011, 2012, or 2013, as designated by the applicant. For Native American tribes, Western may use estimated load values if actual load data is not available. Western will evaluate and may adjust inconsistent estimates during the allocation process. Western is available to assist tribes in developing load estimates if necessary.
- J. The minimum allocation shall be 100 kW.

- K. The maximum allocation shall be 3,000 kW.
- L. Contractors must execute electric service contracts within six months of receiving a contract offer from Western, unless Western agrees otherwise in writing.
- M. Any allocated Post-2017 Resource Pool power not under contract by October 1, 2016, shall be redistributed on a pro-rata basis to the remaining Post-2017 Resource Pool new allottees. In the execution of this redistribution, criteria elements F and K may be waived at Western's discretion. Any Post-2017 Resource Pool power not allocated and under contract by October 1, 2017, shall be distributed in accordance with the 2012 Conformed Criteria.
- N. If unanticipated obstacles to the delivery of electric service to a Native American tribe arise, Western will allow the economic benefit of the resource to be provided to the tribe through benefit-crediting or bill-crediting arrangements.

II. Applications for Power

This notice formally requests applications from qualified entities seeking to purchase Federal power from the Post-2017 Resource Pool. Western is requesting the APD to provide a uniform basis for evaluating applications. To be considered, qualified entities must submit an application to the Western Area Power Administration Desert Southwest Region as requested below. To ensure full consideration for all applicants, Western reserves the right to not consider applications submitted before publication of this notice or after the deadline specified in the **DATES** section. Application forms are available upon request or may be accessed and/or submitted online at

http://www.wapa.gov/dsw/pwrmkt/BCP_Remarketing/BCP_Remarketing.htm.

Applicant Profile Data Application

The content and format of the APD are outlined below. Applicants must provide all requested information, or the most reasonable available estimate, or should indicate “not applicable” if they have no information to be considered for a requested item. Western is not responsible for errors in data or missing pages. All items of information in the APD should be answered as if prepared by the entity seeking the allocation. The APD includes the following:

1. Applicant:

- a. Applicant’s (entity requesting a new allocation) name and address.
- b. Person(s) representing applicant: Please provide the name, title, address, telephone and fax number, and e-mail address of such person(s).
- c. Type of organization: For example, Federal or state agency, irrigation district, municipal, rural, industrial user, municipality, Native American tribe, public utility district, or rural electric cooperative.
- d. Parent organization of applicant, if any.
- e. Name of members or suballottees, if any.
- f. Applicable law under which the organization was established.
- g. Applicant’s geographic service area: If available, submit a map of the service area, and indicate the date prepared.
- h. Describe the entity/organization that will interact with Western on contract and billing matters.
- i. The amount of power the applicant is requesting to be provided by Western.

2. Loads:

- a. All Applicants:

- i. If applicable, number and type of customers served in one of the last three calendar years including calendar years 2011, 2012, or 2013; e.g., residential, commercial, industrial, military base, agricultural.
- ii. The actual monthly maximum demand (in kilowatts) and energy use (in kilowatt hours) experienced in one of the last three calendar years including calendar years 2011, 2012, or 2013.
- iii. For Native American tribe applicants, if actual demand and energy data is not available, provide estimated monthly demand (in kilowatts) with a description of the method and basis for this estimated demand.

3. Resources:

- a. A list of current power supplies, including the applicant's own generation and purchases from others. For each supply, provide the amount of capacity received from that power supply and its location.
- b. Status of power supply contract(s), including a contract termination date. Indicate whether power supply is on a firm basis or some other type of arrangement.

4. Transmission:

- a. Point(s) of delivery: BCP will be delivered at Mead Substation. Applicants may provide preferred point(s) of delivery on Western's transmission system or a third party's system and the required service voltage. The applicant will ultimately be responsible for acquiring transmission to alternate delivery points.
- b. Transmission arrangement: Describe the applicant's transmission arrangements necessary to deliver power to the requested points of delivery beyond Western's transmission system. Provide a single-line drawing of applicant's system, if

available.

- c. Provide a brief explanation of the applicant's ability to receive and use, or receive and distribute Federal power as of October 1, 2017.
5. Other Information: The applicant may provide any other information pertinent to receiving an allocation.
6. Signature: The signature and title of an appropriate official who is able to attest to the validity of the APD and who is authorized to submit the request for an allocation is required.

Western's Consideration of Applications

Upon receiving the APD, Western will verify that the applicant meets the eligibility criteria contained in the 2012 Conformed Criteria and that the application contains all information requested in the APD.

- a. Western may request, in writing, additional information from any applicant whose APD is determined to be deficient. The applicant will have 15 calendar days from the date on Western's letter of request to provide the information.
- b. If Western determines the applicant does not meet the eligibility criteria, Western will send a letter explaining why the applicant did not qualify.
- c. If the applicant has met the eligibility criteria, Western, through the public process, will determine the amount of power, if any, to allocate in accordance with the marketing criteria. Western will send a draft contract to the applicant that identifies the terms and conditions of the offer and the amount of power allocated to the applicant.

Regulatory Procedure Requirements

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Environmental Compliance

In accordance with the DOE National Environmental Policy Act Implementing Procedures (10 CFR 1021), Western has determined that these actions fit within a class of action B4.1 Contracts, policies, and marketing and allocation plans for electric power, in Appendix B to Subpart D to Part 1021 – Categorical Exclusions Applicable to Specific Agency Actions.

Dated: December 17, 2013

Mark A. Gabriel
Administrator

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